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In the Supreme Court of the United States

OCTOBER TERM, 1975

ERNEST L. MONTANYE, FORMER SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL., PETITIONERS

v.

RODNEY R. HAYMES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the question whether the Due Process Clause requires notice and opportunity for hearing on the propriety of a disciplinary transfer of a prisoner from one prison to another.

INTEREST OF THE UNITED STATES

This case presents questions regarding the procedures prison administrators must follow when de-

ciding to move inmates from one place of incarceration to another. Although the case involves directly only the practices of prisons in a single State, the Court's decision may have a direct impact on the existing practices and procedures for management and control of inmates in all other prison systems, including the federal prison system.

In accordance with the statutory mandate to operate "an integrated system" of institutions to "assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions" (18 U.S.C. 4081), the federal Bureau of Prisons currently maintains 50 prisons of various types throughout the country. The Bureau also contracts with state or private institutions for temporary custody of prisoners and for specialized remedial programs.

In fiscal year 1975, 16,529 individuals were committed by the federal courts to the custody of the Attorney General and underwent classification study.[1] After the classification study, each prisoner was transferred to the institution deemed most appropri-

[1] This statistical information has been provided from unpublished sources by the Bureau of Prisons. Although 16,529 individuals were formally committed, a total of 17,718 individuals were received in the federal prisons from all sources, and classification reports would have been prepared for each individual received.

ate. During that year there were also approximately 15,443 other transfers from one institution to another.[2] Of these other transfers, 772 were made for "adjustment purposes," a category that includes transfers arising out of disciplinary problems; in addition, 417 inmates were transferred to more secure institutions, and in many of these cases disciplinary problems would have prompted the transfer decision.

Decisions similar to transfer decisions are made when individuals are placed in, or removed from, facilities operating under contract with the Bureau. During fiscal year 1975, 19,215 prisoners were released on furloughs (some to contract facilities), and 17,800 prisoners were received back in prison from furloughs.[3] Prisoners also are transferred within a single prison to different work and rehabilitative programs. Many of these decisions have consequences to the inmate similar to those of a transfer to another institution.

Resolution of the issues presented in this case may have a substantial impact on the procedures the Bureau must use to effect these initial assignment, classification, and transfer decisions. Although the Bureau's "disciplinary" transfers are made after compliance with the procedural guidelines of *Wolff*

[2] Some inmates were transferred more than once; even so, a substantial proportion of the total inmate population of approximately 23,500 was transferred during the year.

[3] Furloughs are unescorted travel, including home visits, court appearances, work release, study release, and release to half-way houses.

v. *McDonnell*, 418 U.S. 539, we do not concede that the Constitution requires such procedures prior to transfers. The Bureau makes other decisions without *Wolff*-type hearings, and a ruling requiring all prison transfer decisions to be made according to a particular set of rules could seriously interfere with the orderly administration of federal prisons and inhibit the continuing development and revision by the Bureau of its transfer procedures.

STATEMENT

On June 7, 1972, respondent, then an inmate of the Attica Correctional Facility, was discharged from his duties as an inmate law clerk in the prison law library. According to an affidavit filed in the district court, he was discharged because of his continuous disregard of the rules governing use of the law library.[4] Respondent promptly drew up a "petition" addressed to Judge John Curtin of the United States District Court for the Western District of New York. The petition, which respondent circulated among the other inmates for their signatures, asserted that the discharge of respondent and another inmate as law clerks was part of an attempt by the law library officer to foreclose necessary legal assistance to Attica inmates and thus deny them adequate access to the courts. By the time prison au-

[4] This statement is taken from the opinion of the court of appeals (Pet. App. 1a-12a) and from the complaint filed in the district court.

thorities seized the petition from respondent on the afternoon of June 7, he had gathered 82 signatures.[5]

On June 9, 1972, without notice or opportunity for a hearing, respondent was transferred from Attica to the Clinton Correctional Facility. Both Attica and Clinton are maximum security prisons. Respondent was not placed in closer custody in Clinton than in Attica; no notation was made in his records that would reflect adversely on his behavior or diminish his opportunities for parole. He lost neither good time nor the opportunity to earn good time.

On July 10, 1972, respondent brought this action in the United States District Court for the Western District of New York. Although brought in the form of a habeas corpus petition, the action sought neither release from prison, nor a return from Clinton to Attica, nor a hearing, but rather only compensatory and punitive money damages on account

[5] Attica Deputy Superintendent Harold Smith filed an affidavit stating that the petition had been seized because it violated a prison rule prohibiting one inmate from giving legal assistance to another inmate without obtaining permission in advance; Smith alleged that respondent had been warned on several occasions about such conduct.

Rule 21 of the Inmates' Rule Book states: "Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers." As the court of appeals recognized, such rules are necessary to prevent strong-willed inmates from exacting hidden and perhaps non-monetary fees in return for legal assistance, a situation that could jeopardize prison discipline (Pet. App. 3a, 12a).

Respondent has denied that Rule 21 applied to his petition; he contends that it was, instead, personal correspondence with the courts protected by Administrative Bulletin 20 (see Pet. App. 3a).

of respondent's transfer and the confiscation of his petition to Judge Curtin. The district court treated the action as a complaint under 42 U.S.C. 1983 and, after considering affidavits and exhibits, granted summary judgment for the defendants (see Pet. App. 4a) on the grounds (Pet. App. 13a-16a) that the seizure of the petition was proper because respondent should have obtained permission to circulate it and that respondent's transfer was proper because respondent had not alleged that the facilities at Clinton were harsher or substantially different from those at Attica and, in any event, transfers are within the discretionary authority of custodians to control the place of confinement of their wards.

The court of appeals reversed. It concluded that the transfer had inflicted "real hardship" on respondent, both because of the "mere fact of dislocation" and because Clinton, although in other respects virtually identical to Attica, is farther from respondent's home. The court held that "the hardship involved * * * [is] sufficient to render [respondent's] summary transfer—if a trial establishes that it was punitive—a denial of due process" (Pet. App. 10a).[6] The court then remanded the case for trial on the question whether respondent's transfer had been intended as punishment.[7]

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[6] The court defined "punitive transfer" as any transfer "meted out to reprimand, deter, or reform" (Pet. App. 7a).

[7] The court did not attempt to explain the relationship of this holding to its earlier decision in *Newkirk* v. *Butler*, 499 F.2d 1214, vacated as moot *sub nom. Preiser* v. *Newkirk*, June 25, 1975 (No. 74-107), which would have required notice and hearing before any transfer involving "grievous loss," without regard to the motives of the prison officials ordering the transfer. Presumably implicit in the court's opinion is the understanding that the "real hardship" suffered by respondent did not amount to "grievous loss" and therefore that *Newkirk* was not directly applicable to this case; thus the decision below in effect extends the *Newkirk* hearing requirement to all "punitive" transfers. See *Jones* v. *Manson*, 393 F. Supp. 1016 (D. Conn.). But cf. *Bloeth* v. *Montanye*, 514 F.2d 1192 (C.A 2).

Nor did the court address the fact that the relief sought by respondent, money damages from the prison officials, would apparently be unavailable due to the doctrine of official immunity, regardless of the merits of respondent's constitutional claim. See *Wood* v. *Strickland*, 420 U.S. 308. See also *Cox* v. *Cook*, No. 74-751, decided March 24, 1975. However, petitioners have not pressed their defense of official immunity here.

SUMMARY OF ARGUMENT

A

The court of appeals, apparently expanding upon the decision of another panel in *Newkirk* v. *Butler*, 499 F.2d 1214 (C.A. 2), vacated as moot *sub nom. Preiser* v. *Newkirk*, June 25, 1975 (No. 74-107), held that whenever a prisoner transferred from one place of incarceration to another in order to "reprimand, deter, or reform" him has suffered "real hardship," prison administrators must provide him with notice and an opportunity for a hearing. The court's decision was based upon the Due Process Clause of the Fourteenth Amendment. But that Clause applies only in those circumstances in which governmental action deprives an individual of "liberty" or "property." Thus an evaluation of respondent's claim must begin with an inquiry the court of appeals over-

looked—whether respondent has a liberty or property interest in remaining in any particular prison.

Removing a prisoner from a prison into which he has been placed does not deprive him of liberty. He was deprived of his liberty upon conviction, sentence, and incarceration. The very fact of his conviction for a crime, and the legitimate placement of his person into the hands of a custodian who will be responsible for his safekeeping and the supervision of the most intimate details of his life, extinguishes any liberty interest he may possess in selecting his place of residence. The prisoner therefore is not deprived of his liberty by being moved from one prison to another.

The Constitution does not create a liberty interest in being free of the potentially less advantageous circumstances of a different prison, even if the difference amounts to "grievous loss." The conviction and authorized incarceration of any person entitles his custodian to expose him to at least that range of custodial conditions reasonably anticipated by the judge pronouncing the sentence, so long as those conditions do not independently violate the Eighth Amendment. While we do not suggest that it is desirable that transfer decisions be made arbitrarily or on the basis of mistaken factual assumptions, subjection of prisoners to custodial decisions that may not be fully responsive to their situation, while unpleasant, is not barbaric or uncivilized. The risk of occasional subjection to arbitrariness or mistake is to some extent inherent in the custodial relationship,

and the existence of that inherent risk does not create in the prisoner a liberty interest to be free of it.

Certainly a prisoner has an "interest" in remaining in a prison the conditions of which he prefers to those of some alternative prison. But that interest is not constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" does not pertain to the day-to-day living conditions of persons lawfully confined. A prisoner's interests relating to the identity or physical location of his place of confinement are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms and conditions of his confinement. His interests are no more expansive than those established by such statutes, regulations, and rules, and are more closely related to "property" than to "liberty."

This Court's decisions make clear that a legitimate claim of entitlement under a statute, regulation, or rule warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectations.

Under New York (and federal) law, the decision where to confine a prisoner is completely discretionary. No set of facts respondent could prove or attempt to prove would entitle him to remain in an institution where he had temporarily been placed. Even if a prisoner were able to prove, in connection with a proposed disciplinary transfer, that he was innocent of any infraction of the prison's rules, prison officials still would retain discretionary authority to effect the transfer. Because decisions concerning institutional placement are not governed by any particular controvertible facts but instead are discretionary, respondent could under no circumstances have a legitimate claim of entitlement either to remain in one prison or to be moved to another. Accordingly, respondent has no constitutionally protected liberty or property interest in the place of his confinement. Respondent's only "interest" is a hope or expectation to be confined in whatever prison he deems most advantageous to himself. But the Constitution does not require that any particular procedures be used before a State acts to disappoint an individual's unilateral expectations.

Nor does any constitutionally protected interest arise from the mere fact that a prisoner's transfer may be motivated by disciplinary considerations. Where "punishment" does not amount to a deprivation of constitutionally protected liberty or property,

the procedural protections of due process are not implicated.

B

Even when a prisoner has been deprived of a liberty or property interest, it is necessary to examine all interests at stake in order to determine how much "process" is due. We submit that even if a prisoner's transfer from one place of incarceration to another did implicate his liberty or property, the Court should hold that procedures less formal than notice and opportunity for personal hearing are adequate to accommodate the legitimate interests of the prisoner and the competing interests of prison administration.

If it were reasonably feasible to distinguish between a disciplinary transfer and a nondisciplinary or administrative transfer, it might be appropriate to strike the constitutional balance by providing the same procedural protections that are currently provided in connection with punitive sanctions such as loss of good time. See *Wolff* v. *McDonnell*, 418 U.S. 539. But disciplinary and administrative "reasons" are inextricably intertwined in most transfer decisions; a conscientious prison administrator, seeking to place a prisoner in the institution most likely to provide a satisfactory mixture of confinement, punishment, and rehabilitative opportunities, will of course consider the prisoner's record of behavior and compliance with prison rules. A distinction between disciplinary and administrative transfers therefore would be difficult to draw in practice, and even more difficult for the judiciary to administer on a case-by-

case, *post hac* basis, for in almost every prisoner's record there will be some incident upon which he could base a colorable claim that the transfer was intended to "reprimand, deter, or reform" him. In short order, prison officials could well be compelled to adopt uniform and elaborate procedures for all transfers in order to minimize disputes and litigation and preserve a semblance of order in decision-making. That result would, we believe, be most unfortunate, for there are compelling reasons, applicable to both administrative and disciplinary transfers, for allowing such decisions to be made informally.

The range of reasons for which an inmate may be transferred is quite broad. These include the initial classification decision to transfer an inmate to an institution apparently most suitable for the inmate; placement in an institution nearer the offender's release point; placement in an institution more appropriate to the length of time remaining to be served; placement in an institution containing more appropriate training or medical facilities; removal from an institution to which adjustment has been poor; transfers to reduce excessive population or increase deficient population; and removal for the safety of the transferred inmate or other inmates. Many of these causes for transfer do not turn upon objective inmate-specific facts of the sort most appropriate to trial-type determination. Some of them require only the determination of "legislative" facts about which the inmate could offer little of importance at such a

hearing. Others may offer appropriate occasions for entertaining the inmate's views, but these may be obtained without a formal adversarial hearing in every case. Other transfers are made because of suspicions that are incapable of objective proof in the particular case but nevertheless justify action.

Of course, even in many of the foregoing categories, inmate-specific facts may to some extent be relevant to the transfer decision, and hearings might on occasion operate to prevent a transfer prompted in part by a mistaken view as to those facts. But it is the judgment of prison authorities that the institutional costs of providing procedures to reduce the risks of mistakes of this sort outweigh the benefits to be derived from such procedures.

Provision of a trial-type hearing on every transfer occasion does not necessarily increase the welfare of prisoners as a group. It has been contended with some cogency that converting the relationship between the inmate and his custodian into a formally "adversarial" one may interfere with the rehabilitative goal of these institutions and make prison life more acrimonious than is otherwise necessary. Notice of the transfer may increase the possibility that inmates, disappointed by the prospect and despairing of their ability to prevent it, may act violently toward their custodians or other inmates.

What is more, to the extent a hearing will operate to keep within a particular prison one who otherwise would leave, it also will keep out of the presumably "more desirable" institution one who otherwise would

gain entry: one inmate's gain is another's loss. Finally, even when a specific disciplinary infraction is alleged, the hearing could not usefully explore the wisdom of making a transfer decision, for administrators retain discretion to transfer despite the lack of transgression. Accordingly, we submit, the Due Process Clause should not be held to require notice and opportunity for a hearing when prison administrators do no more than allocate their charges to whatever prison, and for whatever reason, the administrators deem best for the prisoner and the prison system.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT REQUIRE NOTICE AND OPPORTUNITY FOR HEARING ON THE PROPRIETY OF A DISCIPLINARY TRANSFER OF A PRISONER FROM ONE PRISON TO ANOTHER

A. A Prisoner Has No Constitutionally Protected Interest In Remaining In A Prison In Which He Has Been Temporarily Placed

1. *The Procedural Protections of the Due Process Clause Apply Only to Proceedings That May Result in the Deprivation of an Individual's "Liberty" or "Property"*

The procedural protections of the Due Process Clause do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or

"property."[8] Accordingly, this Court, in evaluating claims of entitlement to the procedural protections of due process, has been scrupulously careful to identify the nature of the particular substantive interests at stake.

Perhaps the paradigm is *Board of Regents* v. *Roth*, 408 U.S. 564. Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The Court agreed with Roth that he possessed a substantial "interest" in continued employment, but that fact, the Court held, was not determinative of the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment, *i.e.*, his desire to obtain a renewal of his contract, was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that the substantiality

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[8] We need not here discuss the special situation in which the governmental action threatens to deprive the individual of his life.

of an interest is not determinative of whether that interest is entitled to due process protection. Thus the fact that a prisoner's "interest" in avoiding disciplinary transfer to another prison in some circumstances may be substantial cannot be dispositive of the due process claim in this case. To the contrary, as *Roth* further demonstrates, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the individual may be deprived is a constitutionally cognizable liberty or property interest. See also *Arnett* v. *Kennedy*, 416 U.S. 134. It is to that inquiry that we now turn.

2. *Except To The Extent That He May Have A Legitimate Claim Of Entitlement Grounded In The Statutes, Regulations, Or Rules Governing The Conditions Of His Confinement, A Prisoner Has No Constitutionally Cognizable Interest In Avoiding Disciplinary Transfer To Another Prison*

a. *A prisoner has no "liberty" interest in remaining in any particular prison*

A defendant who has been convicted of a crime, sentenced to imprisonment, and confined pursuant to that sentence has, in a very basic sense, lost his "liberty" for the period of his sentence: the sentence of imprisonment lawfully places him under the physical control of the State for the period prescribed. The sentence of imprisonment places the prisoner in the hands of those who will be his custodians for the purposes of punishing him for his crime, detaining him so that he cannot harm others, and, if possible, rehabilitating him so that when he is released he will not resume the conduct that

led to his incarceration. *Pell* v. *Procunier*, 417 U.S. 817, 822-823. Cf. Packer, *The Limits of the Criminal Sanction* 35-70 (1968). All this is a necessary concomitant of incarceration. "Stated simply a man in jail is not a free man; the denial of his right to drink fully from the cup of freedom is the very hypostasis of confinement." *Gittlemacher* v. *Prasse*, 428 F.2d 1, 3 (C.A. 3). Cf. *Jackson* v. *Godwin*, 400 F.2d 529, 532 (C.A. 5).[9]

"Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285. This is not necessarily to say that a prisoner retains no constitutionally cognizable liberty interest at all. Cf. *Procunier* v. *Martinez*, 416 U.S. 396. See generally *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556. We do contend, however, that a prisoner has no constitutionally cognizable "liberty" interest in remaining in any particular prison. The mere identity or physical location of a prisoner's place of confinement is not a matter of constitutional significance: a prisoner's liberty is not affected in a constitutionally significant manner by his transfer from one institution to another, especially where, as

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[9] This Court has stated that the liberty interest as defined by the Fourteenth Amendment is that liberty "essential to the orderly pursuit of happiness by free men." *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 157 (plurality opinion of Mr. Justice Rehnquist); *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, 262 U.S. 390, 399. But a prisoner by definition is not a free man.

here, that transfer is unaccompanied by any adverse alteration in the conditions of confinement.

Certainly a prisoner has no relevant "liberty" interest against transfer deriving from the Eighth Amendment's prohibition against cruel and unusual punishments. This is true even when the transfer is to a more secure institution: a prisoner has no constitutionally protected right to be subjected only to the minimum restraints necessary to confine and rehabilitate him. Since confinement is, after all, a form of punishment, it legitimately may be made uncomfortable both to punish the offender and to deter others from committing similar crimes. See, *e.g.*, *Pell* v. *Procunier*, *supra*; *United States* v. *Foss*, 501 F.2d 522 (C.A. 1). See also *Williams* v. *New York*, 337 U.S. 241, 248; *Powell* v. *Texas*, 392 U.S. 514, 530 (plurality of opinion of Mr. Justice Marshall). See generally Zimring & Hawkins, *Deterrence* (1973).

The severity of the punishment is determined by a combination of factors, foremost among which are the length of the incarceration and the quality of the conditions of confinement. The sentencing tribunal is presently free to select, without restraint other than statutory maxima, the length-of-incarceration component. *Dorszynski* v. *United States*, 418 U.S. 424. It would make little sense, given the sentencing court's ability to control the length of incarceration, for this Court to hold that the conditions of confinement cannot be more severe than those "minimally" necessary to restrain or rehabilitate the prisoner.

In any event, social science research has not yet progressed to the point where we can say with any confidence what is the "minimum" restraint necessarily imposed on an individual. The inmate's reactions to his confinement, his future "dangerousness," and the optimum conditions for his rehabilitation are all so speculative that it would be practically impossible to supervise a "minimum restraints" rule. The courts would be compelling prison officials to attempt the impossible, and the result would be both meaningless and unenforceable.[10] Since we conclude that a prisoner has no liberty interest in avoiding transfer to a more secure institution, *a fortiori*, a transfer like that in question here, from one maximum security prison to another, does not deprive a prisoner of constitutionally protected liberty.

This Court's decision in *Wolff* v. *McDonnell*, *supra*, is not to the contrary. The question in *Wolff* was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn upon the mere fact that a reduction in good-time credits might affect the timing of the prisoner's release, *i.e.*, it did not turn upon a simple identification of release from prison with constitutionally protected liberty. Instead, the Court

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[10] Cf. Note, *Guilt by Physiology: The Constitutionality of Tests to Determine Predisposition to Violent Behavior*, 48 S. Cal. L. Rev. 489 (1974).

focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Since that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court concluded that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach, which would appear necessarily applicable here as well, avoids reference to or reliance upon the loose constellation of constitutionally based values that underlie the analysis of claims of "liberty" interests in non-prisoner cases. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, *supra*, 262 U.S. at 399. The Court's analysis in *Wolff* implicitly recognizes that such values do not, in the main, pertain to persons lawfully confined. A prisoner's interests relating to release, as in *Wolff*, or to the identity or physical location of his place of confinement, as here, are founded not in constitutional concepts of liberty but in the statutes, regulations, and rules that govern the terms and conditions of his confinement. In other words, a prisoner has no constitutionally protected interest in remaining in a particular prison, except

to the extent that those statutes, regulations, and rules create such an interest.

Accordingly, any interest that a prisoner may have in remaining in a particular prison is in fact nothing more than a "property" interest, *i.e.*, an entitlement created by nonconstitutional sources of positive law. Our position here, therefore, is that, whatever the scope of Fourteenth Amendment "liberty" interests in other contexts, a prisoner's interest relating to the identity or physical location of his place of confinement, to be constitutionally entitled to the procedural protections of due process, must satisfy the tests used by this Court for determining the existence of a constitutionally cognizable "property" interest.

b. ***To be constitutionally cognizable, a prisoner's "property" interest in remaining in any particular prison must be grounded in the statutes, regulations, or rules governing the conditions of his confinement***

This Court's recent decisions involving the assertion of property interests make clear that a constitutionally cognizable property interest arises only when the condition limiting the Executive's freedom of action exists in positive law and not merely in the hopes or expectations of the individual. This Court in *Roth* explicitly rejected the argument that such a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or

> desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

A legitimate claim of entitlement exists only when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts. So, for example, in *Goss* v. *Lopez*, 419 U.S. 565, the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy*, *supra*, the employee could be terminated only for cause; in *Perry* v. *Sindermann*, 408 U.S. 593, the teacher asserted a well-settled practice of reemployment absent "sufficient cause." See also *Goldberg* v. *Kelly*, 397 U.S. 254. Where the State has bound itself to extend or confer a benefit, or withhold a sanction, upon the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that the determination of those facts will be made fairly and accurately. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 401-402.

On the other hand, where the State has not so bound itself, there can be no legitimate claim of entitlement. In *Roth*, for example, the university had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to reemployment. See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886. When there is no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

Thus a prisoner, to establish that he has a legitimate claim of entitlement to remain in a particular prison, must point to some statute, regulation, or rule that limits or conditions in some way the State's authority to decide where its prisoners will be confined.

> c. *The fact that a prisoner's transfer may be motivated by disciplinary considerations has no independent constitutional significance*

In our view, the constitutional analysis outlined above is not affected by the particular considerations that may have influenced the State's decision to transfer the prisoner. The fact that a prisoner's transfer may be motivated by disciplinary considerations has no independent constitutional significance.[11] This is

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[11] The court of appeals incorrectly referred to transfers effected because of disciplinary infractions as "punitive." At least in the federal prison system, transfers are not made for punitive purposes. But disciplinary infractions may indicate that an inmate is confined in an improper place and should be transferred to a different prison; for example, transfers to more secure prisons are often effected following the prisoner's attempt to escape from a minimum security prison. Such

not to say that motivation is necessarily wholly irrelevant. If, for example, the regulatory scheme granted a prisoner the right to remain in a particular prison *absent misconduct*, then the prisoner would have a legitimate claim of entitlement: he would be constitutionally entitled to procedural protections that would ensure a fair and rational determination of whether he was guilty of misconduct before he could be transferred. A similar result might follow if the regulatory scheme provided that no disciplinary sanctions of any kind could be imposed without a prior hearing. But the constitutional analysis in each of those circumstances would in essence be the same as that already described: the existence of the prisoner's protected interest turns upon whether some statute, regulation, or rule limits or conditions the State's authority, as custodian, to determine where its prisoners will be confined.

The court of appeals, however, eschewing any conventional analysis of liberty or property rights, laid it down as a maxim that "elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling" (Pet. App. 7a). That statement by the court has a superficial ring of plausibility only because the concept of "punishment" is so closely identified with the deprivation of liberty or property.

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transfers are justified by penological considerations and are not punitive. This essential feature of disciplinary transfers distinguishes them from disciplinary punishments, such as loss of good time.

But where the "punishment" does not amount to a deprivation of constitutionally protected liberty or property, the procedural protections of due process are not implicated. If the individual's liberty or property interests are not affected, the state's motivation, unless invidious or prohibited (*e.g.*, to effect unlawful racial segregation), is constitutionally irrelevant.[12]

In short, unilateral disciplinary decisionmaking by prison officials does not constitute a denial of due process. In so saying, we are aware that unilateral decisions entail some risk of error. But there is no liberty or property interest in diminishing error in decisions not involving liberty or property. Any other result would be mere constitutional bootstrapping, *i.e.*, more elaborate procedures would be required as to governmental decisionmaking merely because less elaborate procedures entail greater risk of error. But an individual has no constitutional interest in more elaborate procedures as such; the Constitution requires such procedures only where they serve the purpose of protecting some substantive liberty or property interest.

Furthermore, to a considerable extent, subjection to unilateral decisionmaking is a necessary result of

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[12] As the court held in *Roth*, the State's reason for refusing to renew the teacher's contract was irrelevant unless the reason was "prohibited," as would be the case if the reason had to do with punishment for the exercise of constitutionally protected rights. But in that event the official action itself would be improper, whether or not a hearing had been provided.

committing an individual to a custodian who will control the most minute details of his daily life. Realistically, the potential for error, even under the most comprehensive procedures, can be eliminated only by eliminating the custodial control. Moreover, it has been theorized that such a regimen—subjection to potentially authoritarian control that will increase the individual's responsiveness to social rules—may be an important part of rehabilitation. See, *e.g.*, Glaser, *The Effectiveness of a Prison and Parole System* 122-123 (1969); Ohlin, *Modification of the Criminal Value System*, in *The Sociology of Punishment and Correction* 179 (Johnston, Savitz & Wolfgang ed. 1962). But see Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority*, 81 Yale L. J. 726 (1972).

Accordingly, we conclude that the procedural protections of due process do not attach to the transfer decision, whether or not that decision is motivated by disciplinary considerations, unless the prisoner can assert a legitimate claim of entitlement, grounded in the statutes, regulations, or rules governing the conditions of his confinement, to remain in the prison where he has been placed. We now turn to the question whether such a claim of entitlement has been established here.

3. *Respondent Has No Legitimate Claim Of Entitlement To Remain In A Particular Prison*

As we have explained above, a legitimate claim of entitlement exists only where the State has bound

itself to take or refrain from taking specified actions on the basis of determinable facts. But once an individual has been confined, no fact or set of facts entitles him to be incarcerated in a particular institution. The State, acting as custodian, may send the prisoner to any institution that, in its discretionary judgment, will advance the purposes for which the inmate has been imprisoned and the needs of the penal system—subject, of course, to any statutes or regulations that control the exercise of that discretion. Unless such statutes or regulations establish legitimate claims of entitlement, an inmate cannot assert an interest in control over the place of his residence, because it was *exactly* that claim that the judgment of conviction stripped from him. The governing federal statutes, 18 U.S.C. 4081 and 4082(b), expressly grant federal prison officials full discretion over the placement and transfer of prisoners. See *Moore* v. *United States Attorney General*, 473 F.2d 1375 (C.A. 5); *Holland* v. *Ciccone*, 386 F.2d 825 (C.A. 8), certiorari denied, 390 U.S. 1045.[13] Thus, not only is there no positive source in statute, regulation, or common law for a legitimate claim of entitlement in this connection, but Congress has specifically declared that, for federal prisoners, transfers

[13] Some statutes of narrow application, such as the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4251-4255, create a legitimate claim of entitlement enforceable, in most circumstances, by the inmate. But 18 U.S.C. 4081 and 4082(b) vest federal prison officials with full discretion concerning an ordinary inmate's place of confinement.

shall *not* be conditioned upon any particular state of facts. The situation in New York appears to be the same. See N.Y. Correction Law § 23 (McKinney Supp. 1974). Even if a prisoner were able to prove, in connection with a proposed disciplinary transfer, that he was innocent of any disciplinary infraction, prison officials still would retain discretionary authority to effect the transfer.

Because no set of facts entitles a prisoner to placement in any particular institution, he does not acquire a legitimate claim of entitlement to remain there.[14] His desire to do so is simply a "unilateral expectation" (*Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577), for which the Due Process Clause provides no procedural protection. The prisoner acquires no claim of entitlement to continuation of the *status quo* unless that claim has been established by rule or statute. Here, the sole source of the expectation of continuity of his current confinement is the prisoner himself; there is no such statute or rule. An inmate can be moved to another institution no matter how well he has behaved in the first. Because of this discretion, there is no legitimate claim of entitlement with regard to institutional residence. As Judge Campbell recognized in his cogent dissent in *Fano* v. *Meachum*, C.A. 1, No. 74-1033, decided June 27, 1975, slip op. 11-12:

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[14] Cf. *Sims* v. *Fox*, 505 F.2d 857 (C.A. 5) (*en banc*) (dismissal from the Air Force as punishment requires no hearings because Air Force membership is neither liberty nor property).

> [E]ven in defining a prisoner's "liberty" interest, one must ask not only whether a particular event may cause loss to the prisoner but whether one in his position has any claim to what was taken away.[2]

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[2] A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer "grievous loss", but the nature of the organization and of their role precludes acknowledging any "liberty" or "property" right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on "privileges" as opposed to "rights", it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to protection against that loss.

> Prisoners are, by definition, prisoners. Changes in the conditions of confinement, whether involving a different cell assignment, a new meal schedule, or transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard, and rehabilitate.
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> As prisoners are involuntary inhabitants and some are dangerous and unpredictable, administrators must decide whether a given inmate is more likely to escape from one place than another, and whether the mere presence of an inmate in a given setting is likely to be volatile and more dangerous. Such judgments may often

be little more than educated guesses based on suspicions. They may involve predictions of future dangerousness which in turn echo assumptions as to the inmate's role in past disturbances. While I can understand the argument that no adverse assumptions should ever be made without minimal due process—hearing, confrontation of witnesses, and the like—I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards, but I do not think the Constitution can reasonably be said to require them.

B. Even if A Prisoner Has A Liberty Or Property Interest In Avoiding Disciplinary Transfer, He Is Not Entitled To Prior Notice And Opportunity For Hearing On The Propriety Of The Transfer

If this Court concludes, contrary to the arguments set forth above, that a prisoner has a legitimate claim of entitlement to remain in a particular prison, it must then consider what process is "due" in connection with the transfer decision. In doing so, it is necessary to balance the interests of the inmate against the countervailing interests of the penological system. *Morrissey* v. *Brewer*, 408 U.S. 471, 481; *Wolff* v. *McDonnell supra*. See generally Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267 (1975). The court of appeals failed to undertake this balancing and consequently erred by requiring inflexible notice and hearing procedures regardless

of the quantum of loss to the inmate in particular cases and the goals and needs of the prison system.[15]

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[15] Federal courts that have considered the requirements of prison transfers generally have failed adequately to balance the countervailing interests. Perhaps the leading authority is *Gomes* v. *Travisono*, 490 F.2d 1209 (C.A. 1), vacated and remanded, 418 U.S. 909, modified and affirmed on remand, 510 F.2d 537. *Gomes* initially required some procedural safeguards in all transfers but differentiated between disciplinary transfers (which received procedures substantially similar to those later approved in *Wolff*) and administrative transfers, which it held required only advance notice and an informal opportunity to respond. On remand, however, the court held that under *Wolff* the purpose and motive for the transfer should be irrelevant because all transfers imposed burdens on inmates and administrators unrelated to the transfer's purpose. See *Fano* v. *Meachum*, *supra*. We submit that *Gomes* both misapprehended *Wolff* and is factually incorrect with respect to the burdens imposed on inmates and administrators.

Other courts have imposed *Wolff*-type procedures only in cases of disciplinary transfer. See, *e.g.*, *Ault* v. *Holmes*, 506 F.2d 288 (C.A. 6), affirming in part and vacating in part 369 F. Supp. 288 (W.D. Ky.); *Stone* v. *Egeler*, 506 F.2d 287 (C.A. 6), modifying and affirming 377 F. Supp. 115 (W.D. Mich.); *Aikens* v. *Lash*, 514 F.2d 55 (C.A. 7); *Fajeriak* v. *McGinnis*, 493 F.2d 468 (C.A. 9) (by implication, holds that routine administrative transfers may be made without hearing); *Bryant* v. *Hardy*, 488 F.2d 72 (C.A. 4) (by implication, holds that need for hearing depends on reasons for and consequences of transfer).

Several district courts have required adversarial hearings for all transfers, regardless of the reason they are carried out. *King* v. *Higgins*, 370 F. Supp. 1023 (D. Mass.) (by implication); *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D. N.H.); *Kessler* v. *Cupp*, 372 F Supp. 76 (D. Ore.); *Capitan* v. *Cupp*, 356 F. Supp. 302 (D. Ore.); *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D.D.C.) (dismissed by stipulation, November 27, 1974); *Jones* v. *Manson*, 393 F. Supp. 1016 (D. Conn.). The rationale for all of these cases is that the quantum of "grievous loss"

The court of appeals would require notice and opportunity for hearing in connection with all "punitive" transfers, but it did not elaborate upon the standards to be used for determining whether a particular transfer is or is not "punitive." If, by

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suffered by the inmate does not depend upon the reason for the transfer.

On the other hand, several district courts have held that an adversarial hearing is required only when a transfer is effected for disciplinary reasons. *Walker* v. *Hughes*, 375 F. Supp. 708 (E.D. Mich.) (court will look to "true" reason for transfer); *Beatham* v. *Manson*, 369 F. Supp. 783 (D. Conn.); *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn). Cf. *Schumate* v. *People of State of New York*, 373 F. Supp. 1166 (S.D. N.Y.) (hearings required only when there is a substantial change in quality of confinement).

Finally, a number of courts have held that hearings are never a prerequisite to the transfer of an inmate. *United States ex rel. Arzonica* v. *Scheipe*, 474 F.2d 720, 721 (C.A. 3); *Gray* v. *Creamer*, 465 F.2d 179, 187 (C.A. 3) ("a state prisoner has no constitutional right to remain in any particular prison" and, therefore, no right to procedural protection); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D. N.J.), affirmed, 481 F.2d 1400 (C.A. 3); *Hillen* v. *Director*, 455 F.2d 510 (C.A. 9); *Benfield* v. *Bounds*, 363 F. Supp. 160 (E.D. N.C.); *Bundy* v. *Cannon*, 328 F. Supp. 165, 173 (D. Md.). Similarly, courts have held that the initial placement and transfer as part of the classification process are within the discretion of the Attorney General and that no hearings are required. *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (C.A. 1); *Van Sirrs* v. *Ciccone*, 437 F.2d 884 (C.A. 8) (initial placement decision not reviewable even for abuse of discretion); *Lawrence* v. *Willingham*, 373 F.2d 731 (C.A. 10); *Rees* v. *Peyton*, 341 F.2d 859 (C.A. 4); *Hogue* v. *United States*, 287 F.2d 99 (C.A. 5), certiorari denied, 368 U.S. 932; *Rayborn* v. *Swope*, 215 F.2d 604 (C.A. 9); *Dominguez* v. *Moseley*, 317 F. Supp. 10 (D. Kan.), affirmed, 431 F.2d 1376 (C.A. 10); *Muniz* v. *United States*, 280 F. Supp. 542 (S.D. N.Y.).

"punitive" transfer, the court means a transfer based explicitly upon an identified disciplinary infraction, our disagreement with the requirement of notice and hearing (once it is assumed that constitutionally protected interests are involved) is slight: where a transfer decision is to be based explicitly upon an identified disciplinary infraction, it may be better practice to afford the prisoner an opportunity for a hearing, as the federal Bureau of Prisons now does, limited, however, to the question whether the infraction actually occurred (cf. *Wolff* v. *McDonnell*, *supra*); for reasons we discuss further below, the scope of such a hearing should not extend to the propriety of the proposed transfer itself.

But if, as seems more likely in view of the fact that the court identified as "punitive" any transfer "meted out to reprimand, deter, or reform" an inmate (Pet. App. 7a), it requires hearings for any transfer based primarily upon an inmate's history or prospects, our disagreement is substantial and pervasive.

If it were reasonably feasible to distinguish clearly between a "disciplinary" transfer and a nondisciplinary or "administrative" transfer, it might be appropriate, assuming that there were a liberty or property interest at stake, to strike the constitutional balance in favor of providing the same procedural protections provided in connection with other disciplinary sanctions under *Wolff* v. *McDonnell*, *supra*. But in most jurisdictions—and these must include all or nearly all of the states, and the federal prison system as well—the nature of any

given transfer decision might often not be readily classifiable. The decision by prison officials to transfer a prisoner from one prison to another is, in most instances, the product of inextricably intermixed disciplinary and administrative considerations. A conscientious prison administrator, who sought to make placement decisions solely on the basis of judgments concerning penological efficacy and with no intention of meting out "punishment," would nevertheless be required to give full consideration to an inmate's record of behavior and compliance with the prison's rules. The distinction between disciplinary and administrative transfers therefore is not easily articulated or applied in practice. Transfers are quite different from the discipline involved in *Wolff*, where the sanction—loss of good time—was clearly punitive and could be imposed only as punishment for particular infractions of the institution's rules.

It seems likely that in most prisoners' backgrounds there is some history of prison misconduct. Thus, any such prisoner, upon transfer, would have some basis to claim that his transfer was disciplinary. If different procedural protections attached according to an assessment of the "ultimate" reason for the transfer, courts would be required upon complaint to make the difficult factual determination whether, in hindsight, the transfer appeared to have been based principally upon disciplinary considerations.[16] The case-

[16] If a transfer was found to be disciplinary, presumably the court would be required to order the prisoner returned to the first prison; a hearing would then follow to determine whether retransfer would be appropriate; and that determination presumably would be subject to review, at least to the extent necessary to ensure that the proper procedures had been employed.

by-case adjudication of transfer complaints under such a scheme might impose an intolerable burden upon the federal courts and would have foreseeable ill effects upon the efficient operation of federal and state prison systems. In such circumstances, prison officials could well be forced to adopt more elaborate procedures for all transfers, in order to minimize disputes and litigation.

Such a result would, we believe, be most unfortunate. The arguments against requiring notice and hearing in connection with transfers are compelling. Many of those arguments apply with equal force to disciplinary and administrative transfers; in the discussion below we elaborate upon the reasons why the propriety of the transfer itself should not be subject to judicial review even when it is intended to serve disciplinary purposes. Procedures less elaborate than notice and opportunity for a personal hearing can accommodate the relevant countervailing interests. We believe this to be true without distinction between transfers involving "grievous loss" and those entailing only "real hardship." See note 7, *supra*. Thus, if this Court concurs in our arguments here, it would be appropriate for the Court not only to reverse the judgment below but also expressly to disapprove the court of appeals' earlier decision in *Newkirk* v. *Butler*, *supra*.

1. *The Current Practices Of The Bureau Of Prisons Provide Flexible But Adequate Accommodation of The Interests Of Prisoners And the Prison System*

As we have discussed at some length in our brief as *amicus curiae* in *Baxter* v. *Palmigiano*, No. 74-1187, and *Enomoto* v. *Clutchette*, No. 74-1194,[17] prisons are closed societies of proven lawbreakers under the constant supervision and control of a limited staff. Widespread hostility, frustration, and inevitable disenchantment on the part of the inmates with their predicament make the atmosphere frequently tense and hostile. Cf. *Wolff* v. *McDonnell*, *supra*. Prison authorities believe that testimonial confrontations between an inmate and staff members or other inmates can exacerbate these tensions and therefore are normally to be avoided, even at the cost of an increased possibility of error in decisionmaking, with the disappointment and frustration such error can generate. To a great extent, the development of procedures governing transfer, classification and discipline of inmates has been a process of accommodating the desire for the increased accuracy hearings can produce with the need for substantial flexibility in meeting volatile conditions and the need for minimizing both the administrative inconvenience and the potential for strife inherent in any hearing procedure. We believe that the current rules and procedures of the federal Bureau of Prisons are a

[17] We are furnishing copies of that brief to counsel for the parties.

reasoned and reasonable accommodation of conflicting interests, developed by authorities who bear the heavy burden of maintaining order and providing for rehabilitation in a closed society of a typically disorderly people.

a. Prior to 1930 a federal prisoner automatically was incarcerated in a state prison in the district in which he or she was convicted. See 1873-1874 Rev. Stat. 5540, 5541, 5542, 5546; S. Rep. No. 533, 71st Cong., 2d Sess. (1930). When the Bureau of Prisons was created in 1930, Section 7 of the Act of May 27, 1930, 46 Stat. 390 (as amended, 18 U.S.C. 4081), required the Bureau to create and maintain a diversified system of institutions to meet the variety of needs encountered in a diverse group of inmates. Sentencing judges were given authority to determine the "type" of institution in which a convict should be incarcerated. After the judge had selected the type of institution, the Attorney General was authorized to choose a specific prison and thereafter to transfer the prisoner in his discretion in order to alleviate overcrowding or attain other penological objectives. Section 7 of the Act of May 14, 1930, 46 Stat. 326 (as amended, 18 U.S.C. 4082). This plan proved too inflexible to meet the administrative and rehabilitative needs of the federal prison system. Often courts designated a type of institution not equipped to furnish appropriate custody, discipline, care and treatment. In order to ameliorate this problem, an individual was assigned initially to an institution of the type designated by the court and then

immedately removed to a more appropriate place of custody.

In 1941 Attorney General Jackson proposed to Congress that the Attorney General be given full discretion to designate and change the place of custody. His letter explained that such administrative discretion was important in order to ensure that inmates would be placed in institutions most conducive to their safekeeping and rehabilitation. See S. Rep. No. 369, 77th Cong., 1st Sess. 1-2 (1941). The authority Attorney General Jackson sought eventually was granted. Subsequent changes have allowed the Attorney General to "extend the limits of the place of confinement" by granting furlough or work release. 18 U.S.C. 4082(c). Special forms of treatment and confinement, some of which are discretionary with the Attorney General and some with the courts, have been established for juveniles (18 U.S.C. 5032), youthful offenders (18 U.S.C. 5010 through 5015) narcotic addicts (18 U.S.C. 4253) and mental defectives (18 U.S.C. 4241). Each of these procedures operates differently and with different effects on the inmate and different problems for administrators.

b. Offenders initially are placed in the custody of the United States Marshals Service, which has access to copies of their judgment and commitment orders and any available presentence reports. Policy Statement 7300.65, dated March 22, 1972. The Service designates an initial place of confinement that appears to satisfy the prisoner's needs for custody and that has an inmate population similar to the prisoner.

As soon as the prisoner arrives at the place of initial custody, a classification study is undertaken in accordance with Policy Statement 7200.11A, dated March 6, 1972 (App. A, *infra*). The prison staff assembles background data, performs educational and psychological tests, and observes the inmate's adjustment to the institution. Several interviews are held with the inmate, both to familiarize the prisoner with the institution and its expectations of him and to enable the staff to establish a good personal relationship with the new inmate.

All of the information gathered by the staff is used by the classification committee (consisting of a caseworker, correctional counsellor, education specialist and health specialist) in the preparation of a classification study that formulates an individual correctional program meeting, so far as possible, the needs of the offender. If it is determined on the basis of this subjective evaluation that either the custodial or the rehabilitative needs of an offender could be met more adequately by another institution, the classification committee recommends the immediate transfer of the inmate to another facility.

c. The Bureau's transfer policy is delineated in Policy Statements 7300.13E, dated June 16, 1975 (App. B, *infra*), and 7400.5D, dated July 7, 1975.[18] Policy Statement 7300.13E authorizes the Chief Executive Officer of each prison to make transfers when-

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[18] The current version of Policy Statement 7400.5D is reprinted as Appendix B to our brief in *Baxter* v. *Palmigiano, supra,* and *Enomoto* v. *Clutchette, supra.*

ever "(1) program or other needs will be best served by the programs at another facility |or| (2) when the continuity of his training and/or treatment program requires it |or| (3) because the resources of the institution are not adequate to meet the inmate's problems" (App. B, *infra*, p. 25a). Whenever it is deemed advisable to make a post-classification transfer, a progress report or special progress report is prepared bringing the inmate's file up to date (App. B, *infra*, p. 40a). Such transfers may be made for a number of reasons:

> It may be for "security" if * * * it is predicated on the apprehension of general and uncontrollable disturbance or on predictions of future misconduct by an inmate. It may be for the best interests of other inmates if the prisoner is disruptive, a threat to others, or otherwise a bad influence as would be the case of a professional with continuing outside criminal contacts. A transfer may be for the best interests of the prisoner himself, for his safety or for his rehabilitation if it is believed that he will be better off elsewhere. And a transfer may be dictated by the needs or shortcomings of the institution, e.g., to alleviate overcrowding. |*Gomes* v. *Travisono*, *supra*, 490 F.2d at 1214.|

We add that transfers also may be justified by the inmate's need for medical care, or to move him to an institution closer to his point of release or more appropriate in light of the time remaining to be served. In almost all of these cases the transfer may be predicated not only on proof of the supporting facts.

but on a reasonable, subjective belief (or even suspicion) that such supporting facts are present.[19] Many of the causes for transfer simply are not susceptible of objective delineation and others—such as the safety of the inmate or the institution—although theoretically objectifiable, are so important that officials may be compelled to act before suspicions can ripen into proof.

Recognizing the diversity in situations to which transfers are addressed, and in light of the potential disadvantages of the widespread use of adversarial hearings, Policy Statement 7300.13E (App. B, *infra*) does not provide for an involvement by the inmate in the transfer decision, except to the extent that the inmate may be involved in the formulation of the progress report or special progress report. Only when a transfer is explicitly based on specific infractions of an institution's rules are hearings provided (Policy Statement 7400.5D), and then only to determine whether the infraction occurred, not whether the proposed transfer is an appropriate response. We submit this fully comports with the requirements of the Due Process Clause.[20]

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[19] The Bureau's regulations do not condition the power to transfer an inmate on the existence of any particular controvertible fact or set of facts although, of course, various facts may often be relevant to the discretionary transfer decision. This discretion is circumscribed only to the extent that hearings are provided when transfers are based, in part, upon specific violations of an institution's rules. Policy Statement 7400.5D.

[20] The government often is permitted to take actions pursuant to an authorized non-hearing process. See *Calero-Toledo*

2. *The Court Should Proceed Cautiously Before Requiring More Extensive Use Of Hearings, Which May Be Inconsistent With Custodial Needs And Rehabilitative Goals*

There are at least two affirmative reasons for believing that the use of hearings (particularly adversarial hearings) should be minimized in this context: hearings may hamper the ability of institutions to rehabilitate the inmates and they may also increase the risk of violence by disappointed inmates. We have discussed these concepts in our brief in *Palmigiano* and *Clutchette*, and we summarize them here.

Testimonial confrontations usually can be handled well in a free society. There, the antagonisms between the individual and the opposing witnesses, who hamper the attainment of the individual's desires, may be diffused in numerous ways—sometimes by the action of the hearing official or other authorities, but more often by the fact that the individual affected may return to his home and a variety of releasing activities, avoiding further contact and venting his emotions in less explosive surroundings.

Diffusion of antagonisms occurs less readily in the typical prison setting, where the parties always remain in close proximity to each other and where many inmates are characteristically impulsive. See Halleck, *Psychiatry and the Dilemmas of Crime* 284

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v. *Pearson Yacht Leasing Co.*, 416 U.S. 663; *Bob Jones University* v. *Simon*, 416 U.S. 725; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594. See generally, Freedman, *Summary Action by Administrative Agencies*, 40 U. Chi. L. Rev. 1 (1972).

(1967); Eysenck, *Crime and Personality* 144 (1964). Give and take among the inmate and the staff is a part of the daily prison routine; when differences are handled informally (or, if necessary, by fiat), potentially disruptive confrontations may be avoided. Excessive formal confrontation may damage or destroy the supervisory counselling relationship essential to the achievement of many correctional goals. Moreover, confrontation might place the inmate in a position of equal contest with the correctional officer and thereby lead to an erosion of the officer's control and authority. See McCorkle, *Guard-Inmate Relationships in Prison*, in *The Sociology of Punishment and Correction* 108-110 (Johnston, Savitz & Wolfgang ed. 1962). One important consideration, therefore, is that in the context of the prison environment direct confrontations between inmates and staff are to be avoided whenever possible. Otherwise, "prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point * * *." *Braxton* v. *Carlson*, 483 F.2d 933, 941 (C.A. 3).

In addition, there is legitimate reason to be apprehensive that, when emotional levels are raised by continuing confrontations between inmate and staff, and between the inmate and other inmates, some inmates will resort to violence. Prisons are populated with individuals who are there because they have demonstrated their unwillingness or inability to conform their conduct to the requirements of a free society. The range of offenses for which they are in-

carcerated is broad, including many crimes of violence. By definition, prison inmates share the characteristic of having on one or more occasions resorted to seriously illegal means to achieve their goals or to resolve problems confronting them.

Inmates may be provoked into unacceptable action merely by an increase in the level of tension within the institution, which could be caused by an increased frequency of adversarial confrontations. They also may respond violently to an advance notice of a particular action that, for any of a number of reasons, is unsettling. Many inmates enter prison with feelings of hostility and frustration, perceiving themselves to have been innocent or unfairly convicted, whether or not an objective observer would agree. Such a refusal to accept guilt for wrongdoing often is accompanied by a concomitant refusal to accept the legitimacy of the authority of their custodians and a tendency to project into the custodians blame for all events occurring in prison. See Halleck, *supra*, at 306; Abrahamsen, *The Psychology of Crime* 110 (1960). As a result of both of these influences, there is an ever-present potential in prison life for a resort to violence as a means of resolving problems, a potential that could be increased to an unknown degree by the injection of advance notice and formal hearings into major portions of prison administration. The Second Circuit analyzed the problem well in *Sostre* v. *McGinnis*, 442 F.2d 178, 197 (*en banc*), certiorari denied *sub nom. Sostre* v. *Oswald*, 404 U.S. 1049:

> It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. * * * We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against * * * prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

Cf. *Pell* v. *Procunier, supra*, 417 U.S. at 825.

3. *Many Transfer Decisions Present Issues Unsuitable For Resolution By Hearing*

A large variety of transfers—perhaps most poignantly those carried out for the safety of the inmate or for the security of the institution—are undertaken without any concrete "proof" that could be adduced in a trial-type hearing, and without any "charges" that could be the subject of notice. The object of transfers of this sort is to take action before the anticipated (or feared) event comes to pass; almost by definition, it will be action founded upon suspicion rather than proof, and it would be a negligent prison administrator indeed who waited for confirmation of his fears before taking action. Trans-

fer decisions of this sort are not amenable to *Wolff* procedures.

For quite different reasons, *Wolff* hearings are unsuitable for decisions involving transfers to different rehabilitative programs at different institutions. The important factual questions in making such transfer decisions relate either to the program at the transferee institution (a subject unlikely to be enlightened by contributions from the inmate) or to the inmate's personal prognosis. Although the inmate surely has an important contribution to make to the latter, it is most appropriately made in diagnostic interviews, in personal performance under observation in prison recreation and employment, and in communications that are incorporated in the progress report, which is an integral part of the transfer decision.[21] The inmate's contributions cannot usefully be made in an adversary hearing in response to notice of "charges."

Still other transfer decisions involve few inmate-specific facts. When a prisoner is transferred because of overcrowding, for example, the most relevant facts concern the comparative population density in the two involved institutions; because the inmate cannot meaningfully contribute to the resolution of any factual dispute about those conditions, trial-type hearings should not be constitutionally required. Where a hearing cannot serve the purpose for which it is

[21] Under Policy Statement 7200.13A, dated October 16, 1974, the inmate is shown a copy of this report.

designed, it is not inflexibly required by the Constitution.[22]

Finally, we point out that the question whether to make a particular transfer is never amenable to adversarial decisionmaking. Even when a transfer is motivated, in part, by an inmate's infractions of institutional rules, the hearing, if any is to be required, should be addressed simply to whether the alleged infraction occurred. Once prison officials have satisfied themselves that there is a reasonable probability that the inmate has transgressed, they retain the discretion with which they began—to decide in what institution the inmate should be housed. That discretionary determination is not amenable to judicial review. Cf. *Procunier* v. *Martinez*, 416 U.S. 396, 405. Accordingly, no purpose would be served by affording the prisoner a hearing on the propriety of a proposed exercise of that discretion.

[22] Even the court below has recognized that in many cases "the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee" (Pet. App. 6a).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

The Bureau of Prisons Policy Statement No. 7200.11A, on Classification Study and Initial Classification, dated March 6, 1972, provides in relevant part:

1. *POLICY.* It is the policy of the Bureau of Prisons to identify and utilize all available training and treatment resources in the correction of public offenders. This allocation of resources is implemented through a systematic classification of offenders and subsequent development of an individual program plan. Since the Classification Study provides the basis for developing an effective treatment program, it is essential for the report to be of professional quality and represent the integrity and best efforts of the classification team or committee.

* * * * *

4. *CLASSIFICATION STUDY.* The Classification Study is a composite of reports and forms submitted by various departments within the institutions and represents the staff's effort to identify the offender's needs and develop a correctional treatment program to meet those needs. To facilitate the review of pertinent information contained in these reports, the study will be arranged according to the following sequence;

A. Sentence Data Summary, BP 5-1

B. Background Data, Record Form 16

C. Staff Evaluation

D. Classification Summary

E. Optional Pages, Psychiatric, Psychological and/or Religious Reports

F. Program Analysis Sheet, BP Form 6.1

G. Program Plan, Classification Form 18

H. Educational Data, BP Form 7

I. Social Data, BP Form 6

J. Medical and Related Data, BP Form 8

5. *INSTRUCTIONS FOR PREPARING THE CLASSIFICATION STUDY.* In order to assure that all Classification Studies meet Bureau requirements, the following instructions should be made available to all personnel involved in the classification process. The instructions should be referred to frequently both as a guide in completing daily work requirements and as a vehicle for training.

A. *Resource Material.* Generally, resource material such as the F.B.I. Fingerprint Report, U.S. Attorney Report, Prosecuting Agency Report, and the Presentence Investigation is made available and serves as the basis for the Classification Study. It is not necessary to reiterate all the information contained in the background material but all relevant and significant information should be summarized

so that the Classification Study will be an independent report capable of standing on its own.

The Presentence Report will continue to be the major contributing resource in the preparation of the Classification Study and to the extent that it is possible, arrangements will be made to have a copy of this report mailed to the institution so that it will be available upon the offender's arrival.

The caseworker will especially need to thoroughly review the Presentence Report in an effort to coordinate his interviews so that he will be able to obtain information that will fill-in, compliment, and amplify areas in the Presentence Report that require elaboration. Interviews should not be used to gather irrelevant data, but should be considered as a probing and diagnostic tool to provide information for evaluating causative factors in the offender's involvement in crime.

When a Presentence Report is not available, all personnel involved in preparing segments of the Classification Summary will have to make a greater effort to obtain the necessary information for effective program planning. Caseworkers should pay particular attention to reports received from other departments and conduct their interviews in a way that will aid them in filling in missing informa-

tion and expand on other areas when necessary. Under these circumstances, the Classification Summary will be presented in much more detail then would be required if a Presentence Investigation Report were available.

* * * *

D. *Classification Summary.* The Classification Summary is the report that brings together information which is known about the offender's criminality, past history, and current status. In the past, this report was very brief and was designed to supplement the Presentence Report and be used in conjunction with it. The previous Classification Summary format and instructions have not produced the kind of information necessary to make enlightened case management decisions without a lengthy research of the files. It has also been noted that Classification Summaries are deficient in many instances and often inconsistent with other segments of the Classification Study. In an effort to correct this problem the Classification Summary has been revised and extended and a Staff Evaluation has been added to the Study. A sample of the format to be used for Classification Summaries is attached. All institutions should plan to reproduce this format on classification form 1b until such time that revised form 17 is made available. Once the revised classification form 17 is available, it will be used as

the face sheet of the Classification Summary and form 1b will continue to be used for subsequent pages, including the Staff Evaluation.

(1) *Current Offense.* The section on current offense should provide the necessary information to determine whether or not the offense was a joint undertaking or an independent venture, a single act or part of a series of acts, situational or a culmination of extended planning. The victim's loss and the offender's net gain should also be summarized in this section. Information under current offense should be divided into two parts.

a. *Official Version and Sentence.* It is necessary for this part of the report to be lengthy. Information related to the offense, basic sentencing data, role of the offender, codefendants, loss to the victim and aggravating circumstances can be generally presented in a few sentences.

b. *Offender's Explanation.* The offender's explanation regarding the offense is essential and should include comments regarding degree of involvement, motivation, and net gain. Again, the explanation need not be long and should represent the caseworker's interpretive summary of what the offender said.

(2) *Prior Record.* It is not necessary to list the prior record in chronological order, or to describe every incident. It is important, however, to distinguish between assaultive acts and crimes against property, between misdemeanors and felonies and between juvenile and adult offenses. The material will be summarized in two parts.

a. *Summary.* In the summary, the caseworker should stress the number and types of arrest, convictions and sentences, and response to previous supervision while confined or under parole or probation supervision. An attempt should also be made to explain any substantial period for which there were no new offenses reported.

b. *Detainers.* A brief statement regarding the status of all known charges and detainers should be made.

(3) *Past History.* Although the Presentence Investigation and other resource material provides a vast amount of information regarding the offender's background, the Classification Summary should concentrate on summarizing relevant information related to the offender's social, educational, military, and employment history. The facts should be presented as succinctly as possible, stressing only that

information which might be related to the offender's criminality.

a. *Social.* In a few sentences, the caseworker should attempt to identify any areas in the offender's social history which may have contributed to his involvement in crime. This might include the neighborhood, family relationships, marriage, physical, and mental health. Detailed information such as the father's place of birth is not necessary or desirable.

b. *Education.* At this point, the caseworker should provide only a brief statement regarding the offender's response to his educational experience, i.e., his adjustment in school and his achievements.

c. *Military.* Again, only a brief statement regarding the offender's military obligation is required. Comment on his status with the Selective Service Board and response to military experience if applicable, i.e., training, adjustment, discharge.

d. *Employment.* This portion of the Classification Summary should provide a concise summary of the offender's total employment experience.

The caseworker should attempt to describe the number and types of previous jobs held by the offender. Adjustment on the job and significant periods of unemployment should also be explained.

(4) *Current Findings.* During the initial classification process, the offender is tested, given a physical examination, interviewed, and observed to gain additional information about his character, physical and mental health and ability to change. Information obtained from these sources should be summarized under the following headings of Character Traits, Physical and Mental Health and Tests.

a. *Character Traits.* The caseworker should make a brief statement regarding the offender's assets and liabilities related to self-control, interpersonal relationships, standards and values. This statement should be drawn from information received from various departments within the institution regarding the offender's behavior, relationship with others and personal habits. As in all other segments of the Classification Summary, opinions should be avoided and the statement should be based on facts.

b. *Physical and Mental Health.* In most situations, a brief statement of the current findings regarding the offender's physical and mental health will be sufficient. If problems are diagnosed, however, the caseworker should indicate the extent and nature of the problems and comment on employability. If indicated, a more extensive report on mental and physical health can be added to the Classification Study under the section entitled "Optional Pages".

c. *Tests.* Each institution administers a number of tests to measure an offender's current standing and potential for achievement. The results of these tests plus an interpretative summary must be made available to the caseworker so that he can incorporate it in the Classification Summary. The caseworker will list all tests given and summarize what the results mean in terms of training and treatment. Any information which is available regarding testing prior to the offender's arrival at the institution should also be summarized.

6. *STAFF EVALUATION.* The Classification Study has been extended to in-

clude a comprehensive staff evaluation. The evaluation will not exceed four paragraphs and generally one typewritten page. This report represents the combined opinion of the Classification Committee or Team and is written in a way which stresses an evaluation of the facts. It will be subjective and judgmental in nature and based on suppositions. Even though it covers some of the same areas as the Classification Summary, the *Classification Summary only reports on facts.* The staff evaluation provided your opinion regarding those facts. The staff evaluation should be reproduced on Classification Form 1b with the date being typed in following the registration number, as indicated on the attached sample.

A. *Illegal Behavior.* In this paragraph, the caseworker should summarize the Classification Committee's or Team's opinion regarding the offender's involvement in crime. Emphasis should be placed on his current attitude regarding the offense, codefendants, his prior record, and pending charges. Some statement regarding his potential for future involvement should also be recorded.

B. *Casual Factors.* The Classification Committee or Team should formulate a theory regarding the offender's criminality and present situation. Such factors as the use of drugs, family problems, health, lack of education and training, emotional and psychiatric problems should be considered and an opinion expressed re-

garding their probable contribution to the offender's current situation and life style.

C. *Program Goals.* The third paragraph of the Staff Evaluation should provide a summary of the offender's correctional treatment and training needs and his program plan. Further, a statement regarding his or her willingness to take advantage of the available resources and an estimated time for completing the program should be included.

D. *Release Plans.* The final portion of the Staff Evaluation should give an opinion regarding the offender's release needs, anticipated release date, and parole readiness for commitments under the Youth Corrections Act, 4208 a-2. and the Federal Juvenile Delinquency Act. Available resources should also be evaluated along with the offender's post commitment plans.

7. *OPTIONAL PAGES.* When there are psychiatric, psychological, and/or religious reports, they should be inserted immediately after the Classification Summary.

Psychiatric or psychological reports will be scheduled by the Medical Department when indicated. Such reports should be prepared as a matter of policy in study cases.

While Chaplains will continue to conduct interviews with all newly committed offenders, they will no longer be required to submit reports on all of them.

Instead they will prepare for circulation to the team members prior to the meeting, reports on those offenders for whom such reports are appropriate in their judgment. While the spiritual and religious aspects of the offender's life still receive primary focus, the Chaplains will not limit themselves to these considerations but will also make observations in other areas when they think that such observations might be useful to the team.

8. *PROGRAM ANALYSIS SHEET.* This sheet is arranged so that the information submitted may be computerized and subjected to statistical analysis. As this data accumulates, it will reveal the areas in which our programs are sufficiently staffed and those in which they are not. These facts will be revealed about each institution and about the system as a whole.

It is extremely important that this information be accurately and conscientiously recorded because manpower decisions will be based on it. To this end, there are management control methods that department heads and wardens will need to exercise. The first obvious check is that the Program Plan be in accord with the Analysis Sheet. If discrepancies occur, especially on a regular basis, then one or the other does not give a true picture. Similarly, the totals of the men participating in given programs or achieving particular goals (e.g., the G.E.D. Certificate) should closely approximate the numbers planned for and recorded on the Analysis Sheets. If no

relationship exists between plans and outcomes, there is an obvious problem.

It is important to stress that the Central Office is trying to gather accurate information in order to plan for and justify program resources. The information can serve the same purpose and has the same value for institution management.

A. *Procedures*

(1) For each correctional factor, indicate the *level of need* by entering the Code 0, 1, 2, or 3 in the corresponding box to the right of each category.

(2) For every factor for which no program is planned enter 2 in the corresponding box to the right of the factor. If program is planned enter (1).

(3) If no program is planned enter code or codes indicating constraints (start at left and list to right side). No more than three constraints may be listed.

(4) If program is planned list activity or activities in the corresponding box (no more than five activities for any one factor).

(5) When a program is not available and a substitution is made—e.g., counseling substituted for psychotherapy because no mental health worker is available—indicate by placing [02|55] under constraints and a [10|58] under activities.

(6) For community based program place 62 and then list activity, e.g., [62|50] indicates study release.

B. *Minimum Program Guidelines.* It is required that offenders be programmed according to the following chart:

Category	Minimum Programming
I	Activities for at least 4 factors*
II	Activities for at least 2 factors*
III	No minimum requirement

* The *Same* program activity can be planned to deal with needs present under *one or more* factors.

Adherence to these guidelines and a comparison between the Program Analysis and the Program Strategy will guard against cases being handled perfunctorily.

The completed Program Analysis Sheet will be kept in the inmate's institutional folder; *a copy will be sent to the Bureau's Information Branch.*

9. *PROGRAM PLAN.* The Program Plan continues to be an important guide in establishing an effective treatment program for offenders.

A. The Staff Evaluation paragraph should be deleted, however, and a new paragraph entitled Transfer Recommendation, should be added. If it appears that the offender is not suitably classified for the program as your

facility, the paragraph of Transfer should be completed and explain your rationale for moving him to another facility.

B. *Environmental Factors.* The correctional factors to be considered in this area are those of Economic Status and Family Conditions. If the staff decision is to apply treatment resources in these areas, the goals of the treatment shall first be spelled out in such a way that progress can be noted and achievement documents. The program to be followed should be outlined in equally specific terms. The form permits variation of review dates if this is considered advisable.

C. *Health.* This section applies to both mental and physical health. Medical goals are sometimes independent of other treatment goals. However, where possible, these decisions should be integrated with other factors such as sentence length, training programs, transfer plans, etc.

D. *Skills.* Both educational and vocational areas should be considered in this area of planning. If resources are to be applied in either or both areas, the goals should be clearly stated. Relatively speaking, it is easier to state goals in measurable terms in these fields than in most of the others. Both goals and program, therefore should be phrased in measurable concrete terms.

E. *Character Traits.* In this section, we consider the correctional factors of self-control, interpersonal relationships, standards and values, and aspirations. These terms and concepts are the most difficult to deal with in measurable behavioral terms and yet the most vital elements of progress are contained here. Each classification group must make a continuous, sincere effort to state their goals, and their plans to achieve them, in behavioral terms. From this effort we should reap improved and refined ideas and ways of expressing them.

10. *SPECIAL TYPE OF CASES*

A. *Processing of Commitments for Study under S. 5034, 5010(e), and 4208(b)*

(1) *Delays in Delivery of Study Cases.* Whenever an offender committed under Section 5034, 5010(e), or 4208(b) is not received by the designated institution within 10 days from the date of the designation made, the Chief, Case Management, at the institution or his delegated representative, shall contact the appropriate United States Marshal's Office by telephone and urge prompt delivery because of the deadlines involved. If the commitment to the institution has not been made within 15 days from the date the designation was made, the institu-

tion shall notify the Bureau by telephone, Office of the Assistant Director, Institutional Services Division.

(2) *Requests for Extensions of the Study Period.* Whenever circumstances such as the inability to collect necessary or reliable data within the time limit allotted for the study, need for more extensive psychiatric or medical examination, etc., indicate the necessity for more time than has been provided in the initial commitment, an extension should be requested. However, this should be an infrequent occurence and extensions should be requested only if absolutely necessary. The chief administrative officer of the institution shall request extensions from the sentencing judge, usually not to exceed 30 days. A copy of the letter and subsequent reply should be forwarded under brief cover memo to the Office of the Assistant Director, Institutional Services Division. Since the Bureau maintains control cards on all study cases, we must receive either the study material or notification that it will be late, 30 days prior to the date the recommendations are due in court.

(3) *Preparation of Classification Study.* Particular attention should be given to the following:

a. When it is ascertained that a Presentence Report has not been prepared by the United States Probation staff, a post sentence report should be requested and every effort should be made to verify and authenticate the information provided by the offender. If information is obtained from the offender, the study report should reflect the source of the material and indicate whether or not it has been verified.

b. In many cases there is a rather obvious reason for the court's request for study. In other cases the purpose is not immediately clear. When there is any doubt in the caseworker's mind regarding the reason for study, he should telephonically contact the United States Probation Officer to clarify the court's concern. Once this has been determined, the study should deal effectively with the areas of the court's concern.

c. The Program Plan and Analysis Sheet (BP 6.1) should be omitted from the study. The Classification Summary will follow the same format used in a regular Classification Summary only it may occasionally be necessary to expand certain segments of the re-

port. The Staff Evaluation will also be the same as that prepared for a regular study and special care should be taken to assure that it represents the total group judgment of the team or committee.

d. When probation is recommended for certain types of community treatment, we believe it should first be determined that the necessary treatment resources are available in the community. We would encourage telephonic communication with the United States Probation Officer in these cases in order to determine whether your recommendations are realistic. Care should be taken, however, to advise the United States Probation Officer that you are only evaluating potential resources and that a final decision has not been made regarding a recommendation to the court. The availability of resources should be spelled out in the Staff Evaluation section of the report.

e. Specific recommendations as to sentence disposition should be included only in the transmittal memo or letter to the court and should *not* appear anywhere in the classification study.

f. Study cases should be assembled as follows: Face Sheet (Record Form BP 5.1); Record Form 16; Staff Evaluation; Classification Summary; Psychiatric, Psychological, and Religious Reports; Form BP 6, Social Data; Form BP7, Educational Data; and BP 8, Medical and Related Data.

g. It is imperative that we prepare comprehensive, well-organized, well-integrated, and well-written classification studies on all offenders committed by the court for study and observation. Particular care should be taken in regard to appearance, grammar, clarity of style, and material consistency. Also, special attention should be given to providing clear and legible copies of the study for submission to the court. All material in the study should be reproduced in the same manner.

(4) *Transmittal of Classification Study and Institutional Recommendations to the Bureau on 4208(b), 5034, and 5010(e) Study Commitments.*

a. Five copies of the classification study and one copy of the Presentence or Post Sentence report shall be submitted to the Bureau, Office of the

Assistant Director, Institutional Services Division, as promptly as possible. In 4208(b) commitments, this material will be submitted within 60 days from the date commitment was imposed, unless an extension has been requested and granted. In 5034 and 5010(e) commitments, material will be submitted within 45 days from the date commitment was imposed, again, unless an extension was requested and granted. Although a specific period of time is allotted for studies (90 days for 4208(b), (60 days for 5034 and 5010(e), it is not necessary that the allotted time be used. Expeditious preparation and submittal of study cases is encouraged, regardless of the amount of time provided by the statutes.

b. In 4208(b) and 5034 cases, the institution recommendations shall be forwarded in the form of a single spaced letter to the sentencing judge for the signature of the Director, Bureau of Prisons. In the past this has been in the form of a draft letter. However, this policy is being discontinued and the letter should be of such high quality that it can be

forwarded directly to the Director for his signature.

c. Each institution should maintain a file containing copies of Bureau study case letters, forwarded to the courts, for training purposes. Special attention should be given to the outline and structure of these letters. Additionally, letters to the court should flow logically from the Staff Evaluation and should be written in a concise, straightforward style. Jargon and theorizing should be avoided. Since a summarization of pertinent factors will have been done in the Staff Evaluation, the main function of the letter is to convey a specific recommendation to the court as to disposition and to briefly outline plans for training and treatment. The treatment plan should support the recommendation. It should not exceed one page in length (single-spaced) and the letter should be undated.

d. In 5010(e) cases, the Chairman of the Youth Division, United States Board of Parole makes the recommendation to the court. However, the institution recommendation shall be

forwarded to the Bureau by a cover memorandum summarizing the staff's recommendations for disposition and their suggestions for specialized treatment and training.

e. The institution staff, particularly the caseworker who drafted the initial letter in 4208(b) and 5034 study cases, should review the copy of the Bureau's final letter to the court. Similarities and differences should be noted. Perhaps, in this way we can all address ourselves to similar issues and approach a common style.

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APPENDIX B

The Bureau of Prisons Policy Statement No. 7300.13E, on Delegation of Transfer Authority, dated June 16, 1975, provides in relevant part:

1. *POLICY.* The Bureau of Prisons attempts to place all committed offenders in the correctional facility for which they are most appropriately classified in terms of age, place of residence, offense, sentence, and prior record.

2. *PURPOSE.* In order to implement this policy, the Director has delegated the authority to the Chief Executive Officer of each federal facility to transfer offenders from one institution to another, or to an approved non-federal facility. This delegation will assure expeditious movement of an offender to an institution for which he more properly classifies.

* * * * *

5. *GENERAL GUIDELINES*

a. A significant number of transfers will be for the purpose of placing newly committed offenders in institutions for which they more properly classify. To provide classification committees and teams with current information as to the mission of each federal institution, there is attached to this delegation Appendix A, which describes the population, characteristics, commitment areas, security limitations, and significant program resources

of each institution. The overall integrity of this classification system must be preserved.

b. Generally, transfer consideration is most appropriately given at the time of intake screening, initial classification, or at regularly scheduled reviews.

c. At an inmate's initial classification, the staff should attempt to plan a complete program for the entire period of confinement, including both institutional and post-release phases. In making this plan, all the resources of the Federal Prison System should be considered.

d. Transfer should be considered when it becomes apparent that the offender's:

(1) program or other needs will be best served by the programs at another facility

(2) when the continuity of his training and/or treatment program requires it

(3) because the resources of the institution are not adequate to meet the inmate's problems

Then the Chief Executive Officer may issue an order directing the transfer of the offender to a more appropriate facility following the guidelines in Appendix A, and subject to the limitations and procedures outlined in this policy statement.

e. In the exercise of this transfer authority, the Chief Executive Officer must be particularly

alert to the limitations (section 6) regarding the place of confinement for misdemeanants, juveniles, youths, addicts, and mentally-ill offenders.

6. *LIMITATIONS AND REGULATIONS*

a. *Federal Juvenile Deliquency Act* cases may be transferred under this delegation of authority to another juvenile or youth institution (namely Pleasanton, Englewood, Ashland, and Morgantown) according to the procedures established in this policy statement. Transfers of FJDA commitments to an institution other than the four named above must be referred to the Regional Administrator, Case Management Branch, for approval.

Transfers of FJDA commitments from Youth Centers to other federal institutions will be approved when it is demonstrated that those programs are clearly warranted; e.g., when the inmate is assaultive and staff and/or inmates are in jeopardy, or when an inmate is a serious escape risk. Under no circumstances will FJDA cases be placed in a penitentiary; placement in FCI's will be limited to those which have large numbers of youthful offenders, e.g., Milan, Tallahassee.

b. *Youth Corrections Act* commitments shall be classified at the receiving institution, where the initial parole hearing will also be given. Following this hearing, or any appropriate

time thereafter, the youth offender may be transferred by delegated authority to another more appropriate *youth* institution without referral to the Regional Case Management Branch. Youth offenders recommended for an adult correctional facility at the time of initial classification or at any later date, shall be referred to the Regional Administrator, Case Management Branch for approval. (See paragraph 7 b. for exceptions).

Any youth offender, having once been authorized for transfer to an adult Federal Correctional Institution, may be transferred under delegated authority to some other, more appropriate, adult FCI. However, any youth offender authorized for transfer to a penitentiary by the Regional Office may not be transferred to another penitentiary under delegated authority; each transfer of this nature must be approved by the Regional Case Management Branch.

c. *NARA, Title II* cases remain at the institution where they are committed unless specific Regional Office authorization is granted. Recommendations require a full progress report and should be forwarded to the Regional Case Management Administrator who will confer with the Regional Mental Health Administrator.

d. *Misdemeanants,* i.e., those offenders who have

been convicted of offenses for which the maximum penalty is one year or less, may not be transferred to penitentiary-type institutions without first obtaining a waiver-Record Form No. 37. Having obtained a waiver, the general delegation of authority may be used as appropriate.

e. *Split sentence* offenders committed under the provisions of Title 18, U.S. Code, Section 3651, may not be transferred to penitentiaries. Under this statute, they may be placed only in "jails or treatment institutions".

f. Offenders having *detainers and probable pending charges*, may be transferred under this delegation of authority to an institution for which they properly classify. Ordinarily, persons in this category should not be moved to an institution more distant from the detaining authority unless there is substantial reason to believe that the detainer will be dropped, or that the pending charge will not be prosecuted. Inmates who indicate an intention to oppose extradition should not be moved under this delegated authority into an institution within the state responsible for placing the detainer. Such cases, and others in which there are legal and/or jurisdictional problems, should be referred to the Regional Administrator, Case Management Branch. Also, Policy Statement 7500.14A should be reviewed concerning this type of transfer.

g. All transfer recommendations for the *concurrent service* of federal and state sentences shall be referred to the Regional Administrator, Case Management Branch, after it is determined that a state will accept the offender. Institutions must instruct U.S. Marshal to place detainer.

h. *Medical and/or Psychiatric Transfers* to the Medical Center for Federal Prisoners, Springfield, Missouri and FCI, Lexington, Kentucky, for either psychiatric or medical care shall be cleared with the Director, Medical Center, or the Chief Executive Officer, Lexington, Kentucky, or authorized representative, prior to effecting the transfer. Upon their advice that facilities are available, and that the referral is suitable, the transfer may be effected. Generally, such referrals are made on the basis of a progress report which includes additional medical or mental health information required in order to make an informed decision. In emergency situations, telephone contact communications may be used to expedite the transfer, followed by appropriate documentation.

The Director of the Medical Center and the Chief Executive Officer, Lexington, are delegated authority to issue transfer orders to return both medical and psychiatric hospital patients, upon recovery, to any appropriate institution, (subject to the broad guidelines of

this Policy Statement). The prospective receiving institution must be notified prior to the issuance of a transfer order. Unusually complicated situations should be referred to the Regional Case Management Branch, in the sending institution's geographic area.

i. *Transfer to local hospital.* When a determination is made that an inmate requires bona-fide emergency inpatient care and should be admitted to a community hospital or government hospital other than one operated by Bureau of Prisons, the Chief Executive Officer of the institution is authorized to issue an order transferring custody of the prisoner to the U. S. Marshal in whose District the hospital is located.

(1) Since these emergency transfers are frequently made hastily, the Marshal should be notified by telephone or teletype, at which time he will be advised regarding the degree of supervision the Warden believes is necessary. This information should be contained in a memorandum covering the transfer order which will be sent to the Marshal as soon as possible.

The cover memorandum which accompanies the transfer order to the Marshal shall include the following paragraph:

"Pursuant to authority delegated to me by the Director, Bureau of Prisons, this is your authority to accept custody of the above-named for commitment to the hospital indicated in the transfer order. By this memorandum, you are authorized to pay the hospital expenses. Please forward the usual jail record cards (Form DJ-100) showing commitment to and discharge from the hospital."

The Bureau's copy of the cover memorandum should be marked for the attention of the Medical Director, Division of Health Services, Bureau. This copy should include a statement regarding the medical reasons for hospitalization.

The Marshal is responsible for paying the costs of hospitalization and treatment. He is also responsible for providing supervision if he determines this is needed. The institution should cooperate with the Marshal by providing supervision until the Marshal is able to arrange for such guards as may be needed.

The Regional Director or his designee (usually the Regional Medical Services Administrator), will be notified that the patient has been transferred to the hospital.

(2) Whenever inpatient care in a local hospital is considered advisable, and no emergency is involved, the advice of the Regional Director or his designee will be obtained prior to issuance of the transfer authorization. This will not apply to Springfield and Lexington.

(3) When the institution is notified that the hospital is ready to discharge the patient, the Warden should issue another transfer order re-transferring the patient from the Marshal to the institution.

j. Offenders in *holdover status* (who are in the process of being transferred—at either the sending or receiving institution), should not be diverted from the intended receiving institution. If, by reason of their adjustment, or other extenuating circumstances, they should not be moved to the receiving institution, referral should be made to the Regional Administrator, Case Management Branch.

(1) Prior to the transfer of FJDA or YCA inmates, the institution will rubber stamp the file (on the outside) "FJDA or YCA OFFENDER." This will alert receiving institutions of the need for special handling. All institutions housing FJDA and YCA offenders will follow Administrative Detention procedures. This means that, in addition to the direct supervision afforded by the Unit Officer, each FJDA or YCA holdover shall be seen daily by a member of the Medical Department and one or more other responsible officer(s) designated in the local policy issuance.

(2) In the event these FJDA or YCA cases require holding longer than 24 hours, a status report will be submitted daily via TWX to Population Control, Central Office. Included should be length of time in holdover status and any other information not routine in nature; for example, control or health problems that are encountered.

FJDA or YCA offenders will be housed separately when possible and not with adult sentenced offenders.

k. *Close Supervision Cases.* Reports on inmates who have been housed in Administrative Detention thirty consecutive days or more, and who refuse to re-enter the general population, will be forwarded to the Regional Office for review and transfer consideration. (Inmates who are Special Offenders are excluded from this category).

If the inmate remains in the Administrative Detention for 60 days and transfer is not resolved, the matter will be referred to the Assistant Director, Correctional Programs Divi-

sion, Central Office, for a decision. (See Policy Statement 7900.51).

l. *Separation Cases and Special Offenders.* When it becomes necessary to transfer inmates who are "stamped cases" (P.S. 7900.47), the recommendation should be referred to the Population Control Section in the Central Office. Also, when the location of codefendants is not known, inquiry should be made of this same office.

m. If a *group disturbance* occurs, it may be necessary to move some of the participants. The Chief Executive Officer should confer with the Regional Director regarding transfer decisions who in turn, will contact the Assistant Director, Correctional Programs Division, regarding disposition of those inmates most seriously involved. This will insure that the Director is informed regarding the resolution of the incident, the overall needs of the Prison Service are taken into account, and that transportation is arranged promptly.

n. Any transfer for *disciplinary reasons* must be accomplished in accordance with procedures outlined in Policy Statement 7400.5, Inmate Discipline.

o. *Community Centers*

(1) The authority to effect transfers to and from Community Treatment Centers has

been delegated to the Chief Executive Officer of the institutions and Centers involved. Transfer authority for directors of non-federal facilities is limited to placing an offender in the custody of the nearest U.S. Marshal. These failures will be referred to the CPO for transfer decision.

(2) Community Treatment Centers are to provide assistance to offenders who do not have independent resources and who would find it difficult to adjust in the community without the services of the Center. Priority consideration should be given to those individuals who lack a job, a place to live or the necessary self confidence to develop resources on their own.

Community Centers are not intended to be used as a reward or solely as a means of returning an offender to the community earlier than the time established by the expiration of his sentence or a parole date. Therefore, transfers should only be approved when it is apparent that utilization of the Center's resources might have a positive impact on an individual's ability to avoid future illegal behavior.

In addition, when reviewing a request for transfer to a Community Treatment Center, the following eligibility criteria should be followed:

(a) Generally, individuals should be within six months of their release date. Plans for greater program duration should be discussed with the CTC Director prior to transfer;

(b) All special offenders being considered for transfer to a CTC, whether release is by MR, parole, or expiration, must be referred for approval to the Assistant Director, Correctional Programs Division, Central Office;

(c) Generally, individuals who have been convicted of violations of financial trust or of an organized, sophisticated offense have little need for CTC programs. Financial trust offenders may be approved by the Warden or Chief Executive Officer, but a special memorandum must be written for the file giving the rationale for the CTC placement. Individuals who have been involved in organized, sophisticated offenses are to be referred to the Central Office for approval.

(d) Those individuals convicted of, or charged with serious or repetitive crimes of violence against a person are generally excluded from CTC programs. If there is reason to consider such an individual, they may

be approved by the Warden or Chief Executive Officer. If such a person is approved, a memorandum must be prepared for the individual's file giving full rationale for the approval, if transfer to a CTC is not stipulated by the Board of Parole. If parole is granted with such a stipulation, no memorandum need by prepared.

(3) Because of the limited capacity and unique nature of community centers, no transfer into a center shall be effective prior to receipt of advice from the Center Director that space is available.

FJDA and YCA offenders will ordinarily not be transferred into a Center until the Youth Division of the United States Board of Parole has set a release date, or until the youthful offender is within 120 days of his release.

p. Transfer recommendation for *boarding federal offenders* in non-Federal Correctional Facilities, for reasons other than protection, shall be referred to the Regional Administrator, Case Management Branch in the Region in which the non-federal facility is located, if the transfer is out of the referring institution's region, or the inmate presents problems. The region will make referral if appropriate.

Otherwise, the institution may refer the case directly to state institution with a copy to the region. Upon approval, the referring institution must forward a copy of the Judgment and Commitment, sentence data with adjustments for extra or forfeited good time, and file material to the state facility. A copy of the sentence data, with instructions to place a detainer shall also be forwarded to the U.S. Marshal in the district in which the state facility is located and to the Regional Case Management Administrator where the facility is located.

q. *D. C. Department of Corrections* referrals should be forwarded to the Assistant Director, Correctional Programs Division, Central Office. D.C. Department of Corrections gives priority to D.C. Code offenders who have made adequate adjustments. U. S. Code offenders are primarily referred for pre-release purposes. Full classification material must accompany referral.

7. *RELATIONSHIP WITH OTHER AGENCIES*

a. *The U. S. Probation Office* must be involved when transferring an offender for release planning purposes. If there is reason to doubt the offender's claim to residence, and/or release resources at the proposed destination, the approval of the receiving Probation Officer will be received before issuing the transfer order.

b. The rules of the *United States Board of Parole* require initial hearings for offenders committed under FJDA, YCA, or Section 4208 (a)(2) immediately after classification. Unless there is definite airlift or bus schedule information to show that the offender can be transferred and receive his initial hearing on a date as early as he would have at the transferring institution, transfer should be deferred until the hearing is completed. Persons awaiting mandatory release or parole violator hearings *should not* be moved until after the hearing has been completed.

The Board of Parole should be kept fully and promptly advised of transfer activity on persons awaiting parole decisions and on those who have been granted parole dates. Those scheduled for Parole Board or Youth Division hearings within 60 days should not be transferred until after the hearing is completed. Special circumstances which might necessitate exceptions to this rule should be cleared with the Board or Division ahead of time.

c. *Courts.* The Chief Executive Officer will assure himself that any complicating jurisdictional and legal problems are resolved before transfer is accomplished. Thus, an offender who has legal action pending should not be transferred without prior consultation with the appropriate U. S. Attorney or referral to the regional counsel.

8. *PROCEDURES*

a. Ordinarily, a decision to transfer an offender should be made at initial classification, or at another regularly scheduled review, for which a complete progress report is prepared. Occasionally, transfer action will be necessary as a result of some unanticipated or emergency circumstance. At such time, a special progress report bringing the entire case up to date, should be prepared. Whenever a full progress report was prepared within 90 days of transfer consideration, a memorandum report, bringing the case up to date will suffice.

b. When consideration is being given to transfer, the Chief Executive Officer will send a copy of the progress report to the Chief Executive Officer of the proposed receiving institution for his comments and concurrence. If they are not able to achieve agreement, the referring institution will bring the matter to the attention of its Regional Director. (Copies of Institution correspondence concerning the referral plus current progress report should be forwarded to the Region). When the institutions involved are in different regions, the referring Regional Office will contact the Regional Office in which the other institution is located.

If the Regional Officers are unable to come to an agreement, the matter will be referred to

the Assistant Director, Correctional Programs Division, for final decision.

c. Each institution is authorized to duplicate blank transfer authorizations. An original and one copy of each order are necessary. (Institutions may wish to prepare an additional copy for their own statistical purpose, but this is not required by this regulation.) A number of federal courts have held, in prosecutions for escape, that the Government must prove the legality of commitment by competent evidence, such as this form.

In order to have the requisite documentation readily available, the "Return of Service" will be executed on the original of the transfer order. Also, in all transfers to Community Treatment Centers (federal or contract non-federal) and in all transfers to non-federal work-release facilities, each copy of the transfer order shall carry the typed notation: "This transfer is effected under the provisions of Section 4082, Title 18, U.S.C." Therefore, as a transfer movement begins, the original transfer order will be placed in an envelope stapled to the A/W control card and attached to the outside of the Messenger Envelope (Std. Form 65) containing the complete inmate file. The Officer who completes the transfer at final destination will execute the "Return of Service" on the original transfer

order, and this will be filed with the commitment papers.

One copy of the transfer order will be placed inside the central file folder upon departure along with the usual material which includes the rationale for transfer. This will serve as the file copy for the receiving institution.

d. The reason for transfer, according to the following code, should be shown on the original and each copy of the transfer order. It is recognized that there may sometimes be overlapping reasons for the transfer. In such instances, please show the primary reason.

With the exception of Code 290, all transfers must be referred to and accepted by the receiving institution. District of Columbia offenders are not to be transferred under Code 290. All D.C. offenders must be referred and accepted by the receiving institution. Also, no inmate shall be transferred to Marion under Code 290. They must be referred to the Warden at Marion for approvel.

Code	
290	*Institution Classification.* (This reason is most appropriate for transfers made at initial classification, and will usually involve transfer to an institution of a different type.)
291	*Nearer Release.* (This reason will be used when transfer is made to an institution nearer the offender's release destination, either at time of initial classification or at a later date.)

Code	
292	*Adjustment Purposes.* (This reason will ordinarily be used when the inmate is moved primarily for the purpose of providing closer supervision and controls. It is related to poor institutional adjustment and must be supported by documentation or misconduct according to the procedures specified in the Disciplinary Policy Statement.)
293	*Closer Custody.* (This reason will be used when custody, in terms of escape, is the primary concern.)
294	*Medical Attention.* (This includes persons moved for medical and psychiatric care, surgery, and narcotic addiction.)
295	*Medical Treatment Completed.*
297	*Training Purposes.* (Transfer made for participation in a specific training program, as dental laboratory at Lewisburg, machine die and tool at El Reno, etc.)
298	*Work/Study Release.* (When transfer is made specifically for participation in work-release program at receiving institution.)
299	*Community Centers.* (All transfers into guidance centers or other community residential centers)
300	*Temp. Transfer* (to custody of U.S. Marshal or local authority.)
301	*To Relieve Overcrowding.*
302	*To Build Up Population*
304	*Drug Abuse Program.* (Non-NARA)
305	*Other.*

e. Reporting transfers on Forms BP-1 and BP-2. Special Attention; Records Control Supervisors. When reporting transfers on Form BP-2

(Daily Report of Discharges), enter in column 7, the code indicating reason for transfer. (See instructions pertaining to Form BP-2, contained in Policy Statement 42110.1)

9. *AUDIT OF TRANSFER ORDERS ISSUED PURSUANT TO THIS DELEGATION*

The Regional Administrator of Case Management is delegated responsibility to audit transfers made under this delegation of authority. In addition, each institution should promptly report to the Regional Office any problems encountered, both as a transferring and a receiving institution.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons
Commissioner,
Federal Prison Industries

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